



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT EMBU**

**SUCCESSION CAUSE NO. 626 OF 2014**

**IN THE MATTER OF THE ESTATE OF JOSEPH NG'ANG'A KANJI (DECEASED)**

**ANTONINA NDUGU NGARI.....APPLICANT**

**VERSUS**

**ELIAS MUNGAI NG'ANG'A.....1<sup>ST</sup> RESPONDENT**

**ALKANJERU NJAGI NYAGA.....2<sup>ND</sup> RESPONDENT**

**RULING**

**A. Introduction**

1. The applicant herein moved this court vide summons dated 24/06/2020 and brought under Rules 43(1), 49 and 73 of Probate and Administration Rules and Section 73(1) of the Land Registration Act of 2012. The applicant basically sought for rectification of grant issued to the 1<sup>st</sup> respondent herein on 25/05/2016 in respect that the name Antonina “Ndungu” Ngari be amended to correctly read Antonina “Ndugu” Ngari and further that the caution lodged against land parcel Nthawa/Siakago/5617 by the 2<sup>nd</sup> respondent be dislodged/ removed.

2. The application is premised on the grounds that, the applicant was a beneficiary of the estate of the deceased and entitled to 0.40 Ha of LR Nthawa/ Siakago/40 which was part of the estate of the deceased. That, however, the name as appears on the certificate of confirmation of the grant reads Antonina Ndungu Ngari instead of Antonina Ndugu Ngari. That further, the 2<sup>nd</sup> respondent has lodged a caution against LR Nthawa/ Siakago/5617 being a sub-division of the estate and thus the 1<sup>st</sup> respondent cannot effectively transfer LR Nthawa/ Siakago/5617 to the applicant. This is notwithstanding the fact that the 2<sup>nd</sup> respondent is a stranger to the estate of the deceased and with no reasonable or justifiable reasons to lodge the caution as his claim on LR Nthawa/Siakago/5617 is fictitious.

3. The application is opposed by the 2<sup>nd</sup> respondent vide his replying affidavit dated 25/08/2020. In a nutshell, his case is that the instant application is similar to an earlier application which is still pending before this court and further that the prayers sought in the instant application was subject of Siakago Civil Suit No. 82 of 2019 - formerly Embu CMCC No. 49 of 2019 which is still pending. As such, it was deposed that, the instant application is an abuse of the court process. He further deposed that he purchased the suit land through the applicant as he was serving with the Kenya Defence Forces outside the country. He thus prayed that the application be dismissed for the above reasons and further for the reasons that the applicant is not the administrator of the estate.

4. The 1<sup>st</sup> respondent did not file any response to the application.

5. With the leave of the court, the applicant filed a further affidavit wherein he reiterated the contents of her supporting affidavit to the application for rectification and further deposed that the prayers in the instant application are different from the prayers in the application dated 19/02/2020. She maintained that she solely bought LR Nthawa/Siakago/5617 and developed the same by constructing a permanent house and engaging in agricultural activities. Further, that at the time of purchasing the said land, the 2<sup>nd</sup> respondent was in the country and was the one who witnessed the sale agreement. She deposed that the 2<sup>nd</sup> respondent has not tendered evidence to prove the purported marriage.

6. The application was canvassed by way of written submissions and the parties herein submitted in support of their rival positions. The applicant submitted that the prayer for the rectification of the grant has not been opposed by the respondents and thus the same ought to be allowed. As to the prayer on removal of the caution lodged by the 2<sup>nd</sup> respondent on LR Nthawa/Siakago/5617, it was submitted that the same was wrongful as the 2<sup>nd</sup> respondent was not within the category specified under section 71(1) of the Land Registration Act of 2012 so as to qualify and entitle him to lodge and maintain a caution on the said land parcel. The applicant submitted that the allegations of a marital

relationship between her and the 2<sup>nd</sup> respondent were unsubstantiated and as such, there is no valid claim to warrant the caution. It was further submitted that there is no iota of evidence to the effect that the 2<sup>nd</sup> respondent was married to the applicant and that he purchased the land through the applicant.

7. The 2<sup>nd</sup> respondent on his part submitted that the instant application is unmerited and ought not to be dismissed for the reasons that the applicant is not an heir or beneficiary of the estate as of right. That her name appeared in the certificate of confirmation of grant only pursuant to the sale agreement between the 2<sup>nd</sup> respondent where she was his agent as he was out of the country and that she is not related to the deceased. As such, the grant ought not to be rectified as the applicant is holding the land in trust for the 2<sup>nd</sup> respondent and any amendment would be prejudicial to him. On the lifting of the caution, he submitted that the same is proper pursuant to section 71(1)(a) of the Land Registration Act and since the estate owed him a contractual obligation in respect of the suit land and which interest is recognized by the said section. It was further submitted that the instant application is premature, bad in law, and an abuse of the court process as there is a pending suit being Siakago Civil Suit No. 82 of 2019 instituted by the applicant against the 2<sup>nd</sup> respondent seeking similar orders. Further, that removal of caution is a new cause of action and the same can only be removed in a separate suit but not by way of an application in this cause.

8. The 1<sup>st</sup> respondent did not file any submissions.

### **B. Issues for determination**

9. I have perused the application herein, the response thereto and the rival written submissions by the parties. It is not in dispute that the names of the applicant as they appear on the certificate of confirmation of grant issued to 1<sup>st</sup> respondent are erroneous to the effect that her names are indicated as Antonina “Ndungu” Ngari instead of Antonina “Ndugu” Ngari. Further, it is also not in dispute that there is a caution lodged on LR Nthawa/ Siakago/5617 by the 2<sup>nd</sup> respondent herein. It is my opinion therefore that the issues which this court is invited to determine are; -

- a) *Whether the applicant has made a case for the rectification of grant*
- b) *Whether the caution lodged by the 2<sup>nd</sup> respondent on LR Nthawa/ Siakago/5617 ought to be lifted.*

### **C. Analysis of the law and determination**

#### **i. Whether the applicant has made a case for the rectification of grant**

10. Rectification of grants is provided for in section 74 of the Law of Succession Act, Cap 160, Laws of Kenya and Rule 43(1) of the Probate and Administration Rules. Under section 74, *errors in **names** and descriptions, or in setting forth the time and place of the deceased’s death, or the purpose in a limited grant, may be rectified by the court, and the grant of representation, whether before or after confirmation, may be altered and amended accordingly.* Rule 43(1) on the other hand provides on the mode **the holder of a grant** ought to approach court for rectification.

11. From the above provisions, it is clear that the power of a court to order rectification of a grant is not general but only limited to instances specified therein. That is where the errors which are sought to be rectified relates to names or descriptions, or setting out of the time or place of the deceased’s death. {See **in the matter of the estate of Geoffrey Kinuthia Nyamwinga (deceased) [2013] eKLR** and also **in re Estate of Kathuita Kavira (Deceased) [2019] eKLR**}.

12. The rectification sought herein is in relation to the names of the applicant and thus falls within the instances when a grant can be rectified.

13. However, despite the applicant having sought orders for rectification of grant of letters of administration issued to one Elias Mungai Ng’ang’a (1<sup>st</sup> respondent herein) on 25.05.2016, it is clear from the affidavit in support of the application that the applicant herein seeks rectification of her names in the certificate of confirmation of grant. It is in that certificate wherein her name is misspelt. In **Re Estate of Oloo Omolo Lumasai (Deceased) [2020] eKLR** and which decision I agree with, the Learned Judge held that a probate court cannot rectify the names on the said certificate of confirmation of grant. The powers of this court to rectify are only limited to grant itself as opposed to the certificate of confirmation of grant.

14. In my opinion, the applicant ought to have moved the court for review of the certificate of confirmation of grant under Order 45 of the Civil Procedure Rules (which is one of the provisions of the Civil Procedure Rules imported into succession practice through Rule 63 of the Probate and Administration Rules. (See **in the matter of the estate of Geoffrey Kinuthia Nyamwinga (deceased) [2013] eKLR**).

15. Further, as the Learned Judge held **in re Estate of Oloo Omolo Lumasai (Deceased) [supra]**, from the language of Rule 43(1), an application for rectification of grant can only be sought by **the holder of the grant sought to be rectified**. In the instant case, the applicant is not the administrator and as such she ought not to have brought the application for revocation.

16. However, I note that what the applicant seeks to rectify is only one of her names from “Ndungu” to “Ndugu.” Rule 49 of the Probate and Administrative Rules (1980) provides for the procedure to move the court in circumstances where no specific provisions are provided for under the rules. Rule 73 on the other hand provides for the inherent power of this court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. Section 47 of the Law of Succession Act further bestows this court with jurisdiction to entertain any application and determine any dispute under the Act and to pronounce such decrees and make such orders therein as may be expedient. Further, this court has a duty to assist in administration of the estate of a deceased person and in doing so, it has the role of removing impediments which might prevent full administration of the estate and where such impediments are not detrimental to the rights

of other beneficiaries.

17. In the instant case, it is my opinion that the intended rectification will not substantially alter the said certificate of confirmation of grant so as to prejudice any party. The mode of distribution and/ or the share of each of the beneficiaries will remain intact.

18. The 2<sup>nd</sup> respondent submitted that the rectification will prejudice him as the applicant is not the rightful owner of the suit land. However, the rectification of her name will not in any way bestow any right on the applicant.

19. In the circumstances, prayer 2 of the application is hereby allowed.

ii. **Whether the caution lodged by the 2<sup>nd</sup> respondent on LR Nthawa/ Siakago/5617 ought to be lifted.**

20. As to the removal of the caution, the applicant deposed that the administration and subsequent registration of the suit land in her name was not possible due to the caution lodged by the 2<sup>nd</sup> respondent on LR Nthawa/ Siakago/ 5617 yet the 2<sup>nd</sup> respondent is a stranger to the estate. The 2<sup>nd</sup> respondent in reply deposed that he bought the land using the applicant as her agent as he was working outside the country and as such, the caution is to protect his interests as the applicant wished to sell the said land parcel. A copy of the sale agreement is annexed to the application herein.

21. The essence of a caution is to forbid the registration of dispositions in the subject land because the cautioner is apprehensive that such registration may obliterate his interest in the land. (**See Kiptuya Ngerech Too –vs- Peris Wangui Macharia & another [2018] eKLR**) and therefore, so long as the caution is in place, the land cannot be fully administered.

22. The 2<sup>nd</sup> respondent in his written submissions submitted that the removal of caution is a new cause of action and the same can only be removed through a separate suit but not by way of an application in the instant cause. The 2<sup>nd</sup> respondent further deposed in his replying affidavit to the effect that there exists another case being Siakago Civil Suit No. 82 of 2019- formerly Embu CMCC No. 49 of 2019 seeking removal of the said caution.

23. I have perused the court record and I have noted that despite the applicant pleading that she is one of the beneficiaries of the estate of the deceased and entitled to 0.40 Ha of LR Nthawa/Siakago/40, and further despite her assertion that she was entitled to LR Nthawa/Siakago/5617 which is a resultant from the sub-division of the estate, the said LR Nthawa/Siakago/5617 is registered in the names of the 1<sup>st</sup> respondent. The applicant did not present any evidence to the effect that she has any interest on the said land parcel. A perusal of the sale agreement on record indicates that she purchased one acre out of the Nthawa/Siakago/40. However, there is no evidence to the effect that Nthawa/Siakago/5617 which is a sub-division of Nthawa/Siakago/40 belongs to her.

24. In my view, the proper person to apply for the removal of the caution on the said land ought to be the 1<sup>st</sup> respondent as the registered owner. The applicant's interests in the same have not yet crystallized.

25. The 2<sup>nd</sup> Respondent deposed that there is an application dated 19/02/2019 filed by the 1<sup>st</sup> respondent before this court and which is still pending. That the 1<sup>st</sup> respondent further filed another application on 9/04/2020 seeking to withdraw the said application. I have perused the court's record and indeed there is such an application which was filed on 20/02/2020. When it came up before the court on 24/02/2020 *ex-parte*, the applicant was ordered to serve the same for inter-parties hearing. However, there is nothing on record indicating whether the same was heard and determined.

26. The 2<sup>nd</sup> respondent deposed that application filed on 20.02.2020 (by the 1<sup>st</sup> applicant) was withdrawn. In support of this deposition, he annexed to his replying affidavit a copy of the application which seems to be seeking prayers for withdrawal of the application filed on 20/02/2020 (Annexure "ANN 3"). However, from the perusal of the said annexure, it is clear that the same is neither stamped nor dated. Further, from the court record, there is no evidence as to the said application (seeking withdrawal of the application of 20/02/2020) having been heard and determined.

27. It is my view therefore, that the application which was filed on 20/02/2020 is still pending. The same was filed by the 1<sup>st</sup> respondent and seeks lifting of the caution lodged by the 2<sup>nd</sup> respondent. In my opinion, it is this application which needs to be prosecuted. This is due to the fact that he is the registered owner of Nthawa/Siakago/5617 and therefore has the *locus standi* to move the court. The applicant does not have the *locus standi* to seek the prayer for the removal of the caution.

28. Taking all the above discourse into consideration, it is my opinion that the application dated 24/06/2020 ought to succeed partially and in terms of prayer 2 only. The grant of letters of administration issued to Elias Mungai Ng'ang'a on 25.05.2016 ought to be rectified to the extent that the name of Antonina "Ndungu" Ngari be amended to read Antonina "Ndugu" Ngari.

29. Since the application has partially succeeded, each of the parties herein should bear their own costs.

30. It is so ordered.

**Delivered, dated and signed at Embu this 16<sup>th</sup> day of December, 2020.**

**L. NJUGUNA**

**JUDGE**

.....for the Applicant

.....for the Respondents